IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.**1121** OF **2002**

Mohammed Fasi @ Fasil @ Bablu
Ismail Shaikh
Convict No. - C/12645,
Presently lodged at
Yerawada Central Prison,
Pune. ....Appellant.
(Original Accused No.1)

V/s.

The State of Maharashtra
(at the instance of Anti
Narcotic Cell, C.B.C.I.D.,
Mumbai, C.R.No.22/99) ....Respondent.

Mr Arfan Sait, advocate for the appellant in Criminal Appeal No.1121 of 2002

Mr. D.P. Adsule, APP for the State.

ALONG WITH

CRIMINAL APPEAL NO.269 OF 2002

Shaikh Salim Shaikh Amir. ....Appellant
(Orig. Accused No.2)

V/s

The State of Maharashtra
(Anti Narcotic Cell
CB CID, Mumbai P.C.R.
No.22/99) ....Respondent.

Mr. Ayaz Khan, dvocate for the appellant in Criminal Appeal No.269 of 2002.

Mr. D.P. Adsule, APP for the State.

CORAM: V.M.KANADE,J.

DATE: 19/04/2005.

ORAL JUDGMENT:

1. The appellant in Criminal Appeal No.1121 of 2002 is the original accused No.1 and the appellant in Criminal Appeal No.269 of 2002 is the original accused No.2 in N.D.P.S. Special Case No.217 of 1999. Criminal Appeal No.1121 of 2002 is filed through jail. The appellants in both these appeals have been convicted by the Special Judge for the offence punishable under section 8(c) read with section 29 and 8(c) read with section 20(b)(ii) of the N.D.P.S. Act and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay fine of Rs 2 lacs each and, in default, to undergo rigorous imprisonment for six months by judgment and order dated 11/1/2002. Since both the appeals are filed by the accused who were convicted by the same judgment, both these appeals are being disposed of by this common judgment.

2. Brief facts are as under:-

3. The appellants were charged that they had committed an offence under section 29 read with section 8(c) and section 20(b)(ii) of the N.D.P.S. Act and it was alleged that they, alongwith their associates Dada, Vicky, Khalid, Salim and Raju on or prior to 21/02/1999 or prior to that at Mumbai and

elsewhere entered into a criminal conspiracy and aided and abetted with each other to indulge into a narcotic transaction to transport, possess to sell or to carry narcotic contraband Charas. Both the appellants were also charged that they had individually committed an offence punishable under section 20(d)(ii) read with section 8(c) of the said Act and that in pursuance of the transaction mentioned hereinabove were present on 21/2/1999 at 17.30 hours in Room No.200, Chawl No.13, Bharat Nagar, Bandra (East), Mumbai -400051 and were found in possession of 20 kgs of Charas and, therefore, they had committed the said offence.

4. The prosecution case in brief is that Chandrashekhar Harishchandra Nalawade who was attached to Anti N/Cell, CB CID as PSI, received information that one person viz. Dada, another Vicky, Khalid, Salim and Raju had formed the International Drug Trafficking Racket and two persons viz. Mohd Fasil Ismail and Salim Shaikh were assisting them in drug trafficking. The prosecution case is that P.W.1 - Chandrashekhsar Nalawade was informed that huge quantity of Charas has been received by them from Kashmir. It was their intention to export this contraband to foreign country and that the said consignment was lying in room No.200, Bandra (East),

Mumbai at the residence of Mohd. Fasi @ Bablu Ismail and that the said consignment was likely to be removed. Accordingly, he recorded the information in writing, informed his superiors, contacted two panchas, pre-trap panchanama was prepared. Thereafter, an entry was made in the Station Diary and they went near the place of the said Room No.200 and noticed that two persons were packing some black colour balls in cartons. Thereafter, P.I. Chaudhary who was the member of the raiding party locked the door and it was opened by one of the two persons. Then the members of the raiding party disclosed their identity and P.I. Chaudhary appraised the accused of their rights under section 50 and after they expressed their willingness to search by the raiding party, the search was undertaken and four boxes were noticed which were stacked to the wall. From these boxes as also from the ground, black colour balls were recovered and the quantity was tested on the Drug Identification Kit which gave positive result for the presence of Charas. Thereafter, four samples of 25 gms each were prepared and put in brown coloured envelope and were marked. The other balls were put in a polythene cloth which was tied with jute thread cello tape and packed properly. Thereafter, samples were sent to Chemical Analyser who informed that the

samples tested positive and indicated the presence of Charas (Hashish) The accused were arrested. The panchanama was made and the Room was locked and the FIR was lodged by the P.W.1. Chandrashekhar Nalawade. The statements of other witnesses were recorded. The charge-sheet was filed against the accused. The charge was framed as stated hereinabove. The accused pleaded not guilty to the said charge.

5. The prosecution examined 9 witnesses and also relied upon the documentary evidence which was produced during the trial. The trial Court accepted the evidence adduced by the prosecution and convicted the appellants for the offence with which they were charged and sentenced them to suffer rigorous imprisonment for 10 years. They were also given set off for the period they were in custody since 21/2/1999 under section 428 of the Criminal Procedure Code.

6. I have heard Shri Arfan Sait, the learned Counsel appearing on behalf of original accused No.1 and Shri Ayaz Khan, the learned Counsel appearing on behalf of original accused No.2 at length. I have also heard Shri D.P. Adsule, the learned APP appearing on behalf of the State.

7. The learned Counsel for the appellants have taken me through the judgment and order of the trial court as also the original documentary evidence on record. The submissions made by the learned Counsel appearing on behalf of the appellants in brief are as under:-

8. The defence of accused No.2 is that he was picked from his family residence on 20/2/1999 and that the police were making inquires about one Khalid, the brother of the wife of accused No.2. It is his case that he, alongwith his family, was taken to Andheri Office of Narcotic Cell wherein his wife was compelled to make telephone call at Aurangabad and further a demand of Rs 40,000/- was made for releasing her husband i.e. accused No.2. The accused No.2 was compelled to sign the panchanama which was already prepared by threatening to shoot his son who was also brought in the said office. It is the case of accused No.2 that he was not at the alleged spot where his presence has been shown by the prosecution witnesses. The defence of the accused No.2 is that he was not present in the premises when the alleged contraband was seized. Further, it is his case that there is no evidence to connect the accused No.2 with the premises where the alleged contraband was seized.

9. The defence of accused No.1 is that he was not in possession of the premises and that the prosecution had not taken any efforts to find out who was actually in possession of the Room at the relevant time. He has further stated that the owner of the house P.W. 5 - Sk. Ahmed Yasin has stated that he knew one Bablu and he has not stated that he knew him as Mohd. Fasi. Further, it is alleged that the Room in which the contraband was allegedly found was not properly sealed or locked as, subsequently, P.W.5 was in possession of the said Room and there was nothing on record to indicate as to how he acquired the possession of the Room which was locked by the police. It is alleged that no statement under section 67 of the N.D.P.S. Act had been recorded by the police and, lastly, both the accused have alleged that there were discrepancies in the Chemical Analyser's report and, on that ground, there was no evidence to show that the contraband found in the Room was Charas (Hashish). Both the learned Counsel, in support of their submissions, also relied on various judgments of the High Court and the Supreme Court.

10. The learned APP appearing on behalf of the State submitted that the accused were apprehended at the

spot where the Charas was found and the entire procedure as laid down under section 42(1)(2) as also under section 50 of the said Act had been followed. He submitted that there was ample evidence to indicate that the accused were apprehended in the Room where this contraband was found. He further submitted that the sample of the contraband was sent to the Chemical Analyser who had submitted the report indicating that the said quantity was Charas. He submitted that there was a positive link which had been established by the prosecution, indicating the presence of the accused in the Room. After seizure of the contraband, the chemical analysis was done and the contraband was found to be Charas. Thus the commission of the offence by the accused has been established beyond the reasonable doubt by the prosecution. He submitted that, therefore, the judgment and order of the trial court was liable to be confirmed.

11. I have given my anxious consideration to the submissions made by the learned counsel appearing on behalf of the accused and the learned APP appearing on behalf of the State.

12. The prosecution, in the present case, has examined 9 witnesses. The accused No.2 has examined 4

defence witnesses. The case of the defence, in brief, is that both the accused had been falsely implicated. Secondly, the theory of conspiracy with the other persons viz. Dada etc had not been established by the prosecution. Thirdly, the prosecution had not established that the Room in which the contraband was found was in exclusive possession of the accused or that they were having knowledge or were conscious about the said possession and, lastly, the Chemical Analyser's report could not be relied upon since the Chemical Analyser had not been examined and the report did not indicate the manner in which the test has been performed. Since the submission is restricted on this point, it will not be necessary to consider whether the provisions of section 42 and 50 have been complied with, as the said question has not been seriously pressed by the learned counsel appearing on behalf of the accused. Thus, the only question which needs to be considered is : whether the prosecution has established that the accused were in exclusive possession of the Room and were conscious of the contraband being in their possession?

13. The prosecution has relied upon the evidence of P.W. 1 - Chandrashekhar Nalawade, PSI who is the complainant in this case and was also a member of the

raiding party. From the perusal of the evidence of this witness, it can be seen that he has stated all the events regarding receipt of the information and the subsequent procedure being followed and, thereafter, apprehending the accused alongwith the contraband. In support of the said evidence, the prosecution has also examined P.W.3 - Pandharinath Korgaonkar who is examined as panch in respect of the seizure panchanama. The prosecution has then examined P.W. 5 - Sk. Ahmed Yasin who has been examined as the owner of the Room and P.W. 6 - Vyankatesh Bangera who was the neighbour residing in the said building.

14. From the evidence of P.W.1, it can be seen that the prosecution's case is that the accused No.1 was in possession of the said Room. From the perusal of evidence of this witness, it can be seen that no serious efforts have been taken by him to find out who is the real owner of the Room as no evidence has been brought on record to indicate as to when the accused No.1 was in possession of the said premises. The prosecution has not produced any documents such as Ration Card or electricity meter/bill or any other document to indicate that the accused No.1 was in exclusive possession of the Room. Further, there is no evidence to indicate that both the accused had any

connection with the other persons whose names have been disclosed in the information which was received by P.W.1 viz. Dada, Vicky, Khalid etc. It appears that after the charge-sheet was filed, permission was obtained to carry out further investigation and, thereafter, the statement of P.W.5 and P.W.6 was recorded.

15. So far as the P.W.5 - Sk. Ahmed Yasin is concerned, he claims to be the owner of the said Room. However, no documentary evidence has been produced to show that he is the actual owner of the Room. P.W. 5 does not give any evidence against accused No.2. The statement of P.W.5 is recorded almost after one year from the date of the incident. P.W. 5 states that accused No.1 is Bablu and he does not recognize him as Mohd. Fasi. In his evidence he has stated that in the said Room sons of his brother-in-law viz. Aslam, son of Mohd Ismail and Bablu are staying and that he is the real owner of the Room No.200. He has stated that Bablu is the son of his brother-in-law and that he is staying in part of the said Room No.200 since 20 years. He has further stated that he is not on talking terms with accused No.1 since there was dispute between the two regarding the possession of the Room. P.W. 5 has produced the receipt of MHADA

dated 4/4/2000 for payment of Rs 1402/-. A copy of this receipt was never supplied to the accused. P.W.5 also has produced a copy of the Ration Card. However, a copy of the Ration Card was neither furnished to the defence nor was it annexed to the charge-sheet. He has further stated that on the date of the incident, he had been to Bandra and had stayed there for three days and after he returned he was informed that the contraband had been seized from his Room. He has further stated that he does not know whether the accused No.1 is also called as Mohd. Fasi and that he knew him only by name Bablu. He has further admitted that at the time when the incident had taken place, he was at Bandra and, therefore, he was not in a position to say as to who had stayed in the Room with accused No.1. In the cross-examination, he has admitted that his statement was recorded on 30/9/2000 and that he had not given any information to the police in respect of the person named Mohd. Fasi. In his cross-examination, he has further admitted that the police officers had made inquiries about Bablu. He further admitted that he had not shown the Ration Card or the receipt to the police. In the cross-examination by the counsel for accused No.2, P.W.5 admitted that in portion of the Room his sister-in-law’s sons were staying. He further

admitted that the person at Serial No.2 on the Ration Card - Exhibit-50 was not his son and that, in the Ration Card, the names of his sister-in-law, her brother-in-law Jalalluddin and her son Sajid and daughter Rehana are shown. Thus, from the evidence of P.W.5, it can be seen that it is difficult to rely on the evidence of this witness. The evidence of P.W.5, therefore, does not establish that the accused No.1 was in exclusive possession of the Room. In the cross-examination it is disclosed that in the Ration Card the names of number of other persons are also mentioned. Even the Ration Card and the receipt of MHADA has been produced by the prosecution for the first time in the court and copies of the same were not furnished to the accused. P.W.5 identifies accused No.1 as Bablu and not as Mohd. Fasi. He also, admittedly, has a grudge against him on account of dispute between the two in respect of the said Room. The statement of P.W.5 has been recorded almost after one year after the incident. This witness, therefore, appears to be a got up witness. He is not in a position to disclose who is actually in possession of the said Room. It is also not established that he is the owner of the said Room as the Ration Card and the receipt does not establish that he is the owner of the said Room. He also does

not give any evidence against accused No.2. Thus, the prosecution, in my view, has not been in a position to establish that the accused No.1 was in exclusive possession of the Room. So far as the accused No.2 is concerned, it is not the case of the prosecution that he was in possession of the Room.

16. The prosecution has also relied upon the evidence of P.W. 6 - Vyankatesh Bangera. He has stated that he is staying at the said place in Chawl No.13, Room No.199 for about 18 to 20 years and that he knew P.W.5. P.W. 6 also has stated that he does not know any person by name Mohd. Fasi. He has stated that he knows Bablu and P.W.6 pointed his finger towards accused No.1. He admitted that the police officers had raided the place about two years ago and that, at the relevant time, he was in the garage. He has, however, stated that he did not know the nature of the raid made by the police. P.W.6 was asked whether he had seen Bablu at the time of the raid in the Room and the P.W. 6 has stated that he had not paid any attention. Thus, he did not admit having seen Bablu at that time. Thus P.W.6 in his cross-examination admitted that before 30/9/2000 though he was staying at the same address, no police person approached him for making inquiry in the said case. From this

admission in the cross-examination, it is apparent that his statement was recorded on 30/9/2000 i.e. almost after one year from the date of the incident. The evidence of P.W.6 further discloses that the police had not made any investigation or had recorded the statement of neighbour at the time of conducting the said raid. He has further admitted that while his statement was being recorded, he has not stated to the officer about any person by name Mohd Fasi. P.W. 6 also, therefore, appears to be a got up witness. He has not identified the accused No.1. as Mohd. Fasi but has stated that his name is Bablu. He has not stated that he had seen Bablu in the Room when the police had raided the premises.

17. In view of this evidence of P.W.5 and P.W.6, I am of the view that the prosecution has utterly failed in establishing that the accused No.1 was in exclusive possession of the Room. Though the prosecution has examined 9 witnesses, it has not established that the accused No.1 had any connection with the names of the persons which are mentioned in the information which was received by P.W.1. There is, thus, no evidence of conspiracy between the accused Nos. 1 and 2 and others whose names are mentioned in the charge and, therefore, the charge of conspiracy cannot be and has

not been established by the prosecution.

18. The question, therefore, which falls for consideration is : whether the presence of accused Nos. 1 and 2 is proved by the prosecution and, secondly, whether if the presence is proved, the conscious possession of the said contraband by the accused has been proved beyond the reasonable doubt? In this context, the evidence of P.W.1 - Chandrashekhar Nalawade, P.W.3 - Pandharinath Korgaonkar and P.W. 8 - Yellappa Chaudhary will have to be taken in to consideration. Section 54 of the N.D.P.S. Act raises a presumption regarding possession of illicit articles and the burden is cast on the accused to satisfactorily explain and rebut the presumption. In the present case, P.W.1 and P.W.3 have stated that both the accused were present in the Room from which the contraband of Charas was seized. P.W.1 has stated that they had received an information that the accused along with others had entered into a conspiracy to store and export narcotic substances abroad and, accordingly, a trap was arranged. Thereafter, the raiding party had proceeded to the said Room where they noticed that both the accused were putting certain substance in wooden cartons and, thereafter, they were apprehended. In the present

case, the accused No.1 has taken the defence that P.W.1 has falsely implicated him and that P.W.5 had a dispute with him regarding the possession of the Room and, therefore, he had a grudge against him and that the P.W.3 was a pliable panch witness and, therefore, no reliance should be placed on his evidence. The accused No.2 has disputed his presence in the said room. The defence of accused No.2 is that he was picked up from his residence and, thereafter, he was falsely implicated and the panchanama showing his presence in the Room was subsequently prepared in the police station. The accused No.2, in support of his defence, has examined four witnesses viz. his wife D.W. 1 - Salma Salim Shaikh, his neighbour D.W. 2 - Shermohd Taj Mohd. Khan, who has stated that the accused No.2 was apprehended on 20/2/1999, P.W. 3 - Dr. Havovee Mistry who examined D.W.1, wife of accused No.2 and P.W. 4 - Sayyed Noor Mohd. Ibrahim. The accused No.2 also adduced documentary evidence to indicate that phone calls were made to Aurangabad for the purpose of making inquiries about the brother of his wife Salma - D.W.1. From the perusal of the evidence of P.W.1, P.W.3, P.W.5 and P.W. 6, in my view, the prosecution has failed to establish that the Room was in exclusive possession of the accused. P.W.5 who claims to be the owner of the said Room

whose statement was recorded almost after one and half years from the date of the incident and after the charge-sheet was filed, has identified the accused No.1 as Bablu and not as Mohd. Fasi. P.W. 6 who claims to be the neighbour residing in the adjoining Room also has stated that the accused No.1 is Bablu and has denied that his name is Mohd. Fasi. Both the witnesses, therefore, have not identified the accused No.1 as Mohd. Fasi. The prosecution has also failed to bring on record any evidence to show that Bablu and Mohd. Fasi are one and the same person. Though the questions were put to P.W. 5 and P.W. 6 for the purpose of explaining their stand about the identity of Bablu and Mohd Fasi as one and the same person, both these witnesses have not supported the prosecution case on that point. The Investigating Officer did not make any attempt to record the statement of P.W. 5 and P.W. 6 immediately after the incident. P.W. 5 was at Bandra when the incident was taken place and, therefore, he is not an eye witness to the said incident of apprehension of accused Nos 1 and 2. P.W. 6 also does not state that accused No.1 was seen by him in the Room. He also does not mention about the presence of accused No.2. in his evidence. Thus, the only evidence regarding presence of accused Nos. 1 and 2 is in the form of statement of P.W.1 and

P.W.3. P.W. 1 is the complainant and Investigating Officer who has made investigation of the case. P.W.3 is allegedly a panch witness. It is difficult to rely on the evidence of these two witnesses regarding the presence of both these accused on account of several discrepancies which are noticed in the investigation of the case. It is an admitted position that the contraband which was seized and which was kept in the custody after the samples were sent to the Chemical Analyser revealed that the label which was put on the said sample indicated that the contraband was seized on 21/1/1999, though, the incident, according to the prosecution, took place on 21/2/1999. The prosecution has tried to explain that this discrepancy has arisen as a result of an inadvertent error and, therefore, no importance can be attached to the said date which is found on the label which is affixed to the said contraband and the trial court also has discarded this inconsistency by referring to it as an inadvertent error. In my view, it is not possible to simply discard this discrepancy by saying that it is an inadvertent error. It is the case of the prosecution that the Charas to the tune of 250 kilograms was seized from the said Room on 21/2/1999 and that, after the samples were taken and they were sent to the Chemical Analyser, the Charas which was found in the

form of circular balls were put in separate bags and the labels were attached to the said bags. It is an admitted position that almost from all these bags date which is found is 21/1/1999 and not 21/2/1999. The defence of the accused is that the seizure panchanama was prepared in the police station. The defence of accused No.2 was that he was picked up from his house two days before the alleged incident and, thereafter, the panchanama was prepared in the police station and he was asked to sign the said panchanama under coercion. In the light of this defence which has been taken by the accused, it will not be possible to discard this discrepancy as an inadvertent error. This discrepancy, therefore, creates doubt regarding the actual date, time and place where the contraband was seized. This doubt is further strengthened from the fact that though the contraband was seized from the crowded locality from the Room in the Building where there were number of residents, the prosecution has not examined any independent witness to show that the accused were arrested on the said date. In fact, the record indicates that the Investigating Officer did not bother to record the statement of any person either from the same building or any other person from the said locality. On the contrary, after the charge-sheet was filed, almost after one year,

permission was obtained to make further investigation in the matter and, thereafter, the statement of P.W.5 and P.W. 6 has been recorded. Both these witnesses have admitted in their cross-examination that prior to 30/9/1999 they were neither interrogated or questioned by the police nor was their statement was recorded before the said date. This not only indicates callousness on the part of the Investigating Officer but, on the other hand, it also creates a doubt regarding the very fact of seizure of the contraband from the said place and at the said time and in the presence of both the accused. Thus, this is another circumstance which creates doubt regarding the presence of the accused at the time when the said contraband was allegedly seized from Room No.200.

19. It is no doubt true that in a case where the narcotic substance is found in possession of the accused then the presumption is raised under section 54 of the N.D.P.S. Act that the said person had knowledge about the said possession and also was conscious of being in possession of the narcotic substance and in such circumstances the accused has to rebut the presumption which is raised in such a case. However, now it has been held that before such a presumption can be raised, the initial burden of

showing that the accused were found to be in possession of such narcotic substance squarely lies on the prosecution and if it fails to prove this fact then the presumption under section 54 is not raised. This position is quite settled in view of the catena of judgments which shall be referred to at the subsequent stage. The trial court, therefore, in my view has erred in holding that the accused had not rebutted the presumption which is raised under section 54 of the N.D.P.S. Act.

20. Another circumstance, which creates doubt regarding the authenticity of the statement of P.W.1 and P.W.3 is that the P.W.1 in his examination-in-chief says that after the raid was over, he latched the Room with regular lock and P.W.8 took the key in his custody. P.W.1 has admitted in his cross-examination that the Room was not sealed and even the lock was not sealed. Subsequently, the Room was found to be in possession of P.W.5 during the pendency of the case and P.W.5 has not stated in his evidence as to how he got the possession of the Room. P.W.1 has not stated that the key of the Room was given to P.W.5. It was the duty of the prosecution to have put a seal on the said Room and, thereafter, maintain the record regarding handing over of the

possession of the Room to P.W.5. This has not been done and neither P.W.1 nor P.W.8 - P.I. Chaudhary has been in a position to explain in the cross-examination as to why there was no record to indicate handing over of the possession to P.W.5. Though this fact may appear to be insignificant under the ordinary circumstances yet, in the light of the specific defence which has been taken by both the accused, this fact assumes importance in order to test the credibility of the prosecution case. The accused No.2 has examined the four defence witnesses for the purpose of establishing that he was forcibly taken from his house on 20/2/1999 and that he was assaulted by the police and he and his wife was assaulted by the police and his wife was admitted in the hospital. The hospital papers have been produced. Even the doctor who examined the wife also has been examined by the defence as witness. In the light of this defence, the fact regarding the person who was in possession of the Room assumes importance and in this context the non-sealing of the Room creates doubt as to whether the contraband was actually seized from that Room at that particular time as alleged by P.W.1 and P.W.3, the panch witness. In this context the prosecution could have recorded the statement of further independent witness as, according to P.W.3, there were

number of persons who had assembled there to watch the seizure of the contraband. If this was the case, P.W.1 could have recorded the statement of atleast one of such persons, though, ordinarily, it is not necessary to record the statement of more than one independent person, and even under certain circumstances even if the panch witness turns hostile, the evidence of the Investigating Officer cannot be discarded outright. Therefore, in the light of the peculiar facts and circumstances of the case, this fact further fortifies the doubt regarding the prosecution case.

21. Another circumstance which creates doubt regarding the authenticity of the prosecution story is that P.W.1 did not take any steps to verify the ownership of the Room and P.W.5 also was not in a position to satisfactorily prove that he was the owner of the said Room. In view of these circumstances, it is difficult to rely on the evidence of P.W. 1 and P.W.3 regarding the presence of the accused in the said room.

22. It is a settled position in law that in respect of the offences under the N.D.P.S. Act, when the charges are serious and the punishments are heavy for

those offences, the degree of proof must necessarily pass the test of scrutiny and must exclude all other possibilities. The Division Bench of this Court in the case of Matlub Khan Rehmat Khan Vs. State of Maharashtra reported in **1993 CRI.L.J. 3624** has held that the fact that the accused were found in that Room would bring them dangerously close to being linked with that material, but it was still essential for the prosecution to have produced that last bit of evidence in order to conclusively link them up with the contraband. Thus, it has been held that though the accused is found in the room where the contraband is seized, it is the duty of the prosecution to link the presence of the contraband with the accused. In the present case, various circumstances mentioned hereinabove clearly create a doubt about the presence of the accused at the time of the alleged seizure and further, to add to this doubt, there is no evidence to link the accused with the contraband material. The Investigating Officer has nowhere stated regarding the steps which were taken by him to find out the other accused whose names have been found and noted in the information received by them. Both these witnesses also have not given any confessional statement to the Investigating Officer, though there was ample opportunity available to the Investigating Officer to

record their statement under section 67.

23. The Division Bench of this Court in the case of Bashir Shaikh Vs. State of Goa reported in **1991(1) Bom.C.R. 266** while considering the case of conscious possession, held that even though the brown sugar was seized from certain pillow from the house, in the absence of evidence to connect the pillow with the accused on account of other evidence showing the presence of others in the house, the accused was entitled to get the benefit of doubt. In the present case also, even assuming that the accused were present in the said Room, since it has been established that other persons were also in possession of the Room and the ownership or possession of the Room not having been established to be the exclusive ownership/possession of the accused, the accused are entitled to be given a benefit of doubt. The Supreme Court in the case of Mohd. Alam Khan Vs. Narcotics Control Bureau and another reported in **1996 CRI.L.J. 2001** has held that if the prosecution failed to establish the ownership and possession of the premises from which the contraband articles were seized as belonging to the appellant-accused, the appellant-accused was entitled to be acquitted in such a case. In the present case also, the evidence

discloses that the ownership and exclusive possession of the Room has not been established by the prosecution as belonging to accused No.1 and, therefore, the said ratio laid down by the Supreme Court in the said case would squarely apply to the facts of the present case. Similar view has been taken by the other High Courts in number of cases.

24. In view of the above, the accused are liable to be acquitted.

25. Though, the learned counsel appearing on behalf of the accused has also made submissions on other aspects regarding the Chemical Analyser's report, in my view, it will not be necessary to deal with those other submissions since the accused are entitled to be acquitted by giving them benefit of doubt on the two points discussed hereinabove.

26. In the result Criminal Appeal No.1121 of 2002 alongwith Criminal Appeal No.269 of 2002 are allowed. The judgment and order of the trial court is set aside. The accused are acquitted and to be released

forthwith unless they are otherwise required in any other case. The order regarding Muddemal Property passed by the Trial Court, however, is confirmed.

(V.M. KANADE, J.)